IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

IN RE:	§	
	§	
ROBERT DALE BOWEN AND	§	CASE NO. 02-10109-RLJ-13
DEBORAH CAROL BOWEN,	§	
	§	
DEBTORS	§	

ROBERT DALE BOWEN AND	§	
DEBORAH CAROL BOWEN d/b/a	§	
RAPID MASONRY CONSTRUCTION,	§	
	§	
Plaintiffs	§	
	§	
VS.	§	ADVERSARY NO. 03-1007
	§	
LEE LEWIS CONSTRUCTION, INC.,	§	
	§	
Defendant	§	

MEMORANDUM OPINION

Plaintiffs Robert Dale Bowen and Deborah Carol Bowen, doing business as Rapid Masonry Construction, initiated this suit against Defendant Lee Lewis Construction, Inc. seeking recovery of amounts allegedly owing under a subcontract agreement based on theories of breach of contract, unjust enrichment, and quantum meruit. Defendant Lee Lewis Construction, Inc. denies liability, asserting various affirmative defenses, including limitations, and a counterclaim for sums allegedly owing by the Bowens to Lee Lewis Construction, Inc.

This court has jurisdiction of this matter under 28 U.S.C. §§ 1334(b) and 157(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(A), (B), (C), and (O). This

Memorandum Opinion contains the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and FED. R. BANKR. P. 9014.

Background

Robert and Deborah Bowen, plaintiffs in this action, and debtors in the underlying Chapter 13 bankruptcy case, are sole proprietors of their construction business, Rapid Masonry Construction. Lee Lewis Construction, Inc. is a general contractor. Lee Lewis Construction, Inc. and Rapid Masonry Construction[1] entered into a contract on February 2, 1999, under which Lee Lewis Construction, Inc., as general contractor for construction of a United grocery store in Muleshoe, Texas, hired Rapid Masonry Construction as subcontractor to furnish the labor and materials necessary for all masonry work on the building. The contract, titled "Subcontract," is dated February 2, 1999. In effect, Rapid Masonry Construction was to construct the building shell. The contract specifically provides that Rapid Masonry Construction was to install but not furnish rebar, inbeds, flashing, and steel lintels; Rapid Masonry Construction was also not responsible for damp-proofing, waterproofing, sealers, and materials testing.

Rapid Masonry Construction was to be paid $180,121, consisting of materials of $60,250 and labor of $119,871. The parties disagree over the actual date that Rapid Masonry Construction was to begin work on the project. Letters addressing the start date were volleyed back and forth between Rapid Masonry Construction and Lee Lewis Construction, Inc. The

[1]As Rapid Masonry Construction is the sole proprietorship of the Bowens, any reference to Rapid Masonry Construction is a reference to the Bowens.

earliest stated start date was March 8, 1999; the latest was March 31, 1999. The actual date that Rapid Masonry Construction arrived on the job site was April 5, 1999.

The parties also disagree regarding the terms of payment. The Subcontract contemplates progress payments to be made to Rapid Masonry Construction on the 15th day of each month in an amount equal to ninety percent of the value of the labor and materials provided by Rapid Masonry Construction. A letter dated February 24, 1999, from Lee Lewis Construction, Inc. to Rapid Masonry Construction, verifies that payments would be made bimonthly "around the 1st and 15th of each month." David Haynie, project manager for Lee Lewis Construction, Inc. at the time of the project, testified that Lee Lewis Construction, Inc. agreed to make payments on a weekly basis. The Bowens stated that payment applications were to be made on Wednesday with payment to be received the next day.

The first pay application is dated April 21, 1999, and covers the period of April 5, 1999, through April 22, 1999. The amount due was $48,545, which Lee Lewis Construction, Inc. promptly paid. For the period April 22, 1999, through May 6, 1999, Rapid Masonry Construction submitted a pay application dated May 5, 1999, followed by an amended application dated May 6, 1999. The amended pay application reduced the finished labor amount from seventy-five percent to sixty-five percent. Lee Lewis Construction, Inc. raised questions concerning this pay application, but ultimately made payment for the amount owing.

The third pay application was submitted on May 19, 1999, for the period May 7, 1999, through May 20, 1999. The amount due was $29,161.85. A portion of this pay application, $20,565.83, was paid directly to the brick vendor, leaving an unpaid balance of $8,596.20.

Various problems and disputes between the parties developed just prior to and at the time of the third pay application. Lee Lewis Construction, Inc. was generally concerned that there was not enough money in the contract for Rapid Masonry Construction to complete its work. The construction was significantly delayed with each party blaming the other. The Bowens contend that the job site had numerous open ditches that hindered their work; that Lee Lewis Construction, Inc. had failed to provide damp-proofing and flashing, which was a prerequisite to Rapid Masonry Construction's work; that the inbeds were incorrectly marked and located by Lee Lewis Construction, Inc., thereby creating further delays; and that delays with other subcontractors, particularly for interior slab work, created an unsafe working environment, thereby preventing Rapid Masonry Construction from timely completing the project. Lee Lewis Construction, Inc. argues that Rapid Masonry Construction undermanned the project, improperly left the job site for approximately ten days from May 14 to May 24, that it refused to accommodate or be flexible with other subcontractors, and that it generally overstated the risk associated with going forward with its work.

These problems culminated with each party forwarding letters to the other on May 21, 1999. By its letter, Lee Lewis Construction, Inc. placed Rapid Masonry Construction on notice that unless it proceeded with work immediately, the contract would be terminated within three days. This was the second three-day notice letter that had been sent by Lee Lewis Construction, Inc. Deborah Bowen sent her own letter on May 21, 1999, demanding payment by May 22 and stating that a failure to so pay would result in them leaving the job. The Bowens went to the job site on May 22 and, not having received payment by such date, removed the equipment and left

the job site. Both parties sent letters on May 24, 1999, confirming that they each had terminated the contract.

Lee Lewis Construction, Inc. employed a third-party subcontractor to complete the project. The cost of completing the project exceeded the unpaid balance of the Rapid Masonry contract by $39,586.86. This sum represents the counterclaim amount made by Lee Lewis Construction, Inc. The Bowens claim they were entitled to both the unpaid amount of the third pay application, $8,596, plus the retainage from the prior pay applications of $14,889.02, for a total of $23,485.02.

The Bowens filed Chapter 13 bankruptcy on February 4, 2002.

Discussion

Lee Lewis Construction, Inc. contends that the Bowens' claim is barred by the statute of limitations. In response, the Bowens rely on the provisions of section 108 of the Bankruptcy Code, which, under certain conditions, allow a tolling of state law limitations' periods. Lee Lewis Construction, Inc. previously raised and requested the court's determination of the limitations' issue on two different occasions: first, by summary judgment and, second, by request for judgment at the conclusion of the Bowens' case at trial. The court denied each request. A denial of summary judgment does not preclude the court from ruling upon the same claim after a trial on the merits. A trial court is allowed to deny such a motion if for no other reason than the court believes, "that the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In addition, like a motion for summary judgment, the trial court may deny a request for judgment on partial findings, and instead, rule at the end of trial. *Int'l Union of*

Operating Eng'rs, Local Union 103 v. Indiana Constr. Corp., 13 F.3d 253, 257 (7th Cir. 1994). The court therefore addresses the statute of limitations' defense raised by Lee Lewis Construction, Inc. and whether section 108 of the Bankruptcy Code, as raised by the Bowens, allows an extension of the limitations' period.

Accrual of Claims

In Texas, a claim for breach of contract is governed by a four-year limitations' period. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon 2002). This period begins to run from the accrual of the cause of action. *Id.* A cause of action accrues upon the date on which the claimant is first entitled to seek a judicial remedy. *See Robinson v. Weaver*, 550 S.W.2d 18, 20 (Tex. 1977). A construction contract that calls for periodic payments as the project progresses, such as the Subcontract at issue, is a continuing contract. *Hubble v. Lone Star Contracting Corp.*, 883 S.W.2d 379, 381-82 (Tex. App.–Fort Worth 1994, writ denied) (citing *Godde v. Wood,* 509 S.W.2d 435, 441 (Tex. Civ. App.–Corpus Christi 1974, writ ref'd n.r.e.)); *City and County of Dallas Levee Improvement Dist. v. Halsey, Stuart & Co., Inc.,* 202 S.W.2d 957, 961 (Tex. Civ. App.–Amarillo 1947, no writ). A cause of action based on breach of a continuing contract accrues at the earlier of: "(1) when the work is completed; (2) when the contract is terminated in accordance with its terms; or (3) when the contract is anticipatorily repudiated by one party and this repudiation is adopted by the other party." *Hubble*, 883 S.W.2d at 441 (citing *Godde,* 509 S.W.2d at 441; *Halsey,* 202 S.W.2d at 961; *Leonard v. Kendall,* 190 S.W. 786, 788 (Tex. Civ. App.–Dallas 1916, writ ref'd)). *See also Kona Tech. Corp. v. Southern Pac. Transp. Co.*, 225 F.3d 595, 606 (5th Cir. 2000) ("First, the district court ruled that the statute of

limitations was not applicable because there was a continuing contract. As such, the statute of limitations does not run until the contract is completed or terminated"). The Bowens filed this adversary complaint on June 13, 2003. By the complaint, the Bowens claim entitlement to an unpaid progress payment bill submitted on May 19, 1999, as well as unpaid amounts earlier withheld as retainage under the contract.

Progress Payments

On May 19, 1999, the Bowens submitted their third progress payment to Lee Lewis Construction, Inc. On May 21, 1999, Deborah Bowen contacted David Haynie, project manager for Lee Lewis Construction, Inc., regarding the bill. In this conversation, Mr. Haynie stated that Lee Lewis Construction, Inc. was concerned that there was not sufficient money left in the contract to allow the Bowens to complete the contract. He said Lee Lewis Construction, Inc. was therefore not going to pay the third progress payment until the end of the project. Mrs. Bowen considered this to be a breach of the contract and demanded that payment be made the next day. Payment was not made, and the Bowens returned to the job site the next day, packed up their equipment and left the site never to return.

The parties dispute the date on which remittance by Lee Lewis Construction, Inc. was due per their agreement. However, both parties agree that the agreement called for progress payments at regular intervals during the project. The Bowens assert that Lee Lewis Construction, Inc. wrongfully withheld the third progress payment. Lee Lewis Construction, Inc. claims that it was entitled to withhold the payment under the terms of the agreement.

A party anticipatorily breaches a contract by repudiating an obligation called for under the agreement before the obligation arises. *Murray v. Crest Const., Inc.*, 900 S.W.2d 342, 343 (Tex. 1995) (citing RESTATEMENT (SECOND) CONTRACTS § 250 (1979)). For a statement to be deemed a repudiation, "a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform." RESTATEMENT (SECOND) CONTRACTS § 250 cmt. b (1979). After such a statement, the nonrepudiating party has the option to treat the repudiation as a breach, or ignore it and await the agreed upon time of performance. *Bumb v. InterComp Tech., L.L.C.*, 64 S.W.3d 123, 125 (Tex. App.–Houston [14th Dist.] 2001, no writ) (citing *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 211 (Tex. 1999)). "The nonrepudiating party must do one or the other; it cannot do both." *Id.* (citing *Griffith v. Porter,* 817 S.W.2d 131, 135 (Tex.App.–Tyler 1991, no writ)). The nonrepudiating party must continue its performance under the contract if it chooses to ignore the statement and wait until the agreed upon time of performance. *Id.* Here, Lee Lewis Construction, Inc.'s representatives stated that the third progress payment would be withheld until the end of the project. The Bowens, claiming breach of contract, left the job site the next day, May 22, 1999. This event triggered the accrual of the Bowens' claim that payment was not made according to the terms of the agreement. Both Lee Lewis Construction, Inc. and the Bowens declared the contract terminated by their May 24, 1999 letters. This adversary was filed over four years after this date. The Bowens' claim for breach of contract, based on the wrongful withholding of the third progress payment, is outside the limitations' period under Texas law. *See Hubble v. Lone Star Contracting Corp.*, 883 S.W.2d 379, 381-82 (Tex. App.–Fort Worth 1994, writ denied) (holding that a cause of action based on

breach of a continuing contract accrues, "when the contract is anticipatorily repudiated by one party and this repudiation is adopted by the other party.").

Retainage

Under the Subcontract, Lee Lewis Construction, Inc. was to make progress payments to the Bowens for ninety percent of the value of the work and labor during the pay-period. The other ten percent, the "retainage," was to be withheld by Lee Lewis Construction, Inc. until the completion of the project in accordance with the Subcontract. Lee Lewis Construction, Inc. never remitted this amount to the Bowens. Because this amount reflects work actually performed by the Bowens, the Bowens claim entitlement to this retainage.

The Subcontract contains the following termination clause:

> 3.7 If the Subcontractor persistently or repeatedly fails or neglects to carry out the Work in accordance with this Subcontract or otherwise to perform, and fails within three (3) days after receipt of written notice to commence and continue correction of such default or negligence with diligence and promptness, the Contractor may, without prejudice to any other remedy the Contractor may have, terminate the Subcontract and finish the Subcontractor's Work by whatever method the Contractor may deem expedient. If the unpaid balance of the Subcontract amount exceeds the expense of finishing the Subcontractor's Work, such excess shall be paid to the Subcontractor; but if such expense exceeds such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

(Pls.' Ex. 1.) Beginning on May 14, 1999, Lee Lewis Construction, Inc. began sending the Bowens letters demanding that if they did not return to the job site and resume working on the masonry project, Lee Lewis Construction, Inc. would terminate the Subcontract under clause 3.7. The relationship had deteriorated by this time. Rapid Masonry Construction had ceased work and

its project manager had left to tend to another job. The Bowens contend that Lee Lewis Construction, Inc. approved of this "temporary" stoppage in work, which Lee Lewis Construction, Inc. disputes. Finally, after the standoff over the third progress payment, Lee Lewis Construction, Inc. and the Bowens exchanged mutual termination letters on May 24, 1999. Lee Lewis Construction, Inc.'s letter states that Lee Lewis Construction, Inc. was terminating the agreement under clause 3.7 of the Subcontract and that it would be seeking another masonry company to finish the project. The letter cites clause 3.7, and states that the Bowens would either be charged or credited, depending on whether the replacement contract was more or less than the unpaid amounts under the Subcontract agreement. The Bowens' letter states that Rapid Construction was pulling off the job, with no intentions of returning because of the unpaid third progress payment, hazardous working conditions, and mismanagement by Lee Lewis Construction, Inc. The letter states that the Bowens will be seeking compensation based on the actions of Lee Lewis Construction, Inc.

A party repudiates an obligation to pay by unilaterally claiming a right to offset the agreed amount by a claim against the nonrepudiating party. *Murray v. Crest Const., Inc.*, 900 S.W.2d 342, 344 (Tex. 1995). In Lee Lewis Construction, Inc.'s "demand letters", Lee Lewis Construction, Inc. expressly stated that any unpaid amounts would be offset against the amount necessary to finish the project with another contractor. The Bowens, asserting that it was Lee Lewis Construction, Inc. who was actually in breach of the contract, gave Lee Lewis Construction, Inc. notice on May 24, 1999, that the Bowens were ceasing performance on the project and would seek compensation for Lee Lewis Construction, Inc.'s actions. *See Hardin*

Assocs., Inc. v. Brummett, 613 S.W.2d 4, 6 (Tex. Civ. App.–Texarkana 1980, no writ) ("When a party who is obligated to make future payments of money to another absolutely repudiates the obligation without just excuse, the obligee is entitled to maintain his action for damages at once for the entire breach, and is entitled in one suit to receive in damages the present value of the future payments payable to him by virtue of the contract."). As with the unpaid third progress payment, the Bowens treated Lee Lewis Construction, Inc.'s threats and past actions as a breach, triggering the accrual of the Bowens' claim for the retainage amount. *See Hubble*, 883 S.W.2d at 381-82.

Furthermore, Lee Lewis Construction, Inc.'s "demand letters" operated, at a minimum, as an attempt to terminate the Subcontract according to its terms. *See id.* (holding that a cause of action based on breach of a continuing contract accrues, "when the contract is terminated in accordance with its terms . . ."). *See also Kona Tech. Corp. c. Southern Pac. Transp. Co.*, 225 F.3d 595, 606 (5th Cir. 2000). The final letter, dated May 24, 1999, expressly invokes Lee Lewis Construction, Inc.'s rights under clause 3.7 to terminate the Subcontract with the Bowens. This proclaimed termination triggered any claim by the Bowens for unpaid amounts under the contract, including the retainage amount. *See id.* Because this adversary was filed over four years after May 24, 1999, the Bowens' claim for breach of contract based on the wrongful withholding of the retainage amount is outside the limitations' period under Texas law. *See id.*

Unjust Enrichment and Quantum Meruit

In the alternative, the Bowens seek recovery under the theories of unjust enrichment and quantum meruit. A two-year statute of limitations applies to claims for unjust enrichment. *HECI Exploration Co. v. Neel,* 982 S.W.2d 881, 885 (Tex. 1998). Clearly, this claim is barred by

limitations. *Id.* A claim for quantum meruit is governed by a four-year statute of limitations. When a contract calls for continuous work, labor, and materials, such as the continuing Subcontract at issue, any claim for quantum meruit accrues, at the latest, on the last day on which the claimant actually performed work. *Berryhill v. Findeisen*, No. 03-95-00603, 1996 WL 515538 (Tex. App.–Austin, Sept. 11, 1996) (citing *Thomason v. Freberg,* 588 S.W.2d 821, 828 (Tex. Civ. App.–Corpus Christi 1979, no writ)). Because the Bowens ceased working on the project on May 14, 1999, this claim is also barred by limitations. *Id.*

11 U.S.C. § 108(a)

The Bowens maintain that they may utilize the tolling provision found in 11 U.S.C. § 108(a) to extend the applicable statute of limitations and otherwise save their claims against Lee Lewis Construction, Inc. Section 108(a) states:

> (a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of–
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> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) two years after the order for relief.

For section 108(a) to extend the limitations' period, the period must not have expired before the filing of the bankruptcy petition. *See id.* Here, the parties do not dispute that the bankruptcy petition, filed February 4, 2002, was within the four-year limitations' period beginning May 24, 1999. There is also no dispute that if 11 U.S.C. § 108(a) applies, the Bowens' claims for breach of contract and quantum meruit are not barred by limitations. The dispute lies in whether a Chapter 13 debtor may utilize section 108(a) given the statute refers only to actions commenced

by a *trustee* rather than the debtor. *See id.* The policy reason behind this provision is to allow the trustee additional time to discover and evaluate potential causes of action after stepping into the shoes of the debtor. *See Indep. Fire Ins. Co. v. Pender (In re Phillip)*, 948 F.2d 985, 987 (5th Cir. 1991) (citing H. Rep. No. 595, 95th Cong., lst Sess. 318, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6275; S. Rep. No. 989, 95th Cong., 2d Sess. 30 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5816).

Chapter 11 and Chapter 12

Chapter 11 contains a provision that grants a Chapter 11 debtor-in-possession, with some limitations, the same rights and powers as a trustee in a Chapter 11 case. 11 U.S.C. § 1107(a).[2] Chapter 12 contains a similar provision that grants a Chapter 12 debtor-in-possession, with some limitations, the same rights and powers as a trustee in a Chapter 11 case. 11 U.S.C. § 1203.[3] Per these blanket grants of the rights and powers of a Chapter 11 trustee, debtors-in-possession under both chapters are allowed to utilize the tolling provision found in 11 U.S.C. § 108(a). *See United States ex rel. Am. Bank. v. C.I.T. Constr. Inc.*, 944 F.2d 253, 259-60 (5th Cir. 1991) (discussing the applicability of section 108(a) to a Chapter 11 debtor-in-possession via section 1107(a)).

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[2](a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

[3]Subject to such limitations as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330, and powers, and shall perform all the functions and duties, except the duties specified in paragraphs (3) and (4) of section 1106(a), of a trustee serving in a case under chapter 11, including operating the debtor's farm.

Chapter 13

Chapter 13 contains provisions that grant the debtor certain specific rights and powers of the trustee. *See e.g.,* 11 U.S.C. § 1303;[4] 11 U.S.C. § 1304(b).[5] The tolling provision found in 11 U.S.C. § 108 is not one of the specific rights and powers of a trustee granted to a Chapter 13 debtor. Although a Chapter 13 debtor is allowed to retain possession of property of the estate under 11 U.S.C. § 1306(b), there is no provision allowing a Chapter 13 debtor to generally assume the rights and powers of a trustee as is found in Chapters 11 and 12. The leading commentators disagree concerning whether a Chapter 13 debtor should be allowed to utilize 11 U.S.C. § 108(a). *Compare* 16 William L. Norton, Norton Bankruptcy Law and Practice 2d 3 (2002) ("Since a Chapter 13 debtor is not a trustee and is not given the powers of a trustee, the extensions under Code section 108 should not apply to such a debtor even though the action may be beneficial to the estate."), *with* 2 Collier on Bankruptcy ¶ 108.02[3] (15th ed. rev. 2003) ("[S]ection 108 should be applicable to a chapter 13 debtor, who is entitled to remain in possession of all property of the estate and thus retains the right to any cause of action which would otherwise pass to a trustee.").

The Supreme Court recently held that section 330(a) of the Bankruptcy Code does not allow a Chapter 7 debtor's attorney to be compensated from the estate, unless the attorney is employed by the trustee with the approval of bankruptcy court under 11 U.S.C. § 327. *Lamie v.*

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[4]Subject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title.

[5](b) Unless the court orders otherwise, a debtor engaged in business may operate the business of the debtor and, subject to any limitations on a trustee under sections 363(c) and 364 of this title and to such limitations or conditions as the court prescribes, shall have, exclusive of the trustee, the rights and powers of the trustee under such sections.

United States Trustee, 124 S.Ct. 1023, 1027-35 (2004). When section 330 of the Code was amended, "debtor's attorney" was dropped from the list of parties to be compensated from the estate. *Id.* at 1027-28. In *Lamie*, the Court considered whether Congress actually intended this result. *Id.* at 1027-35. The amended provision is awkward and grammatically incorrect. *Id.* at 1029-30. But, in reviewing section 330(a), the Court stated, "when the statute's language is plain, the sole function of the courts–at least where the disposition required by the text is not absurd–is to enforce it according to its terms." *Id.* at 1030 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)). If the plain meaning of the statute does not provide an absurd result, the court should not read an ambiguity into the statute. *See id.* at 1031. Noting the absence of the words "debtor's attorney", the Court refused to impose its preferred result, and instead, deferred to words of the statute as written. *See id.* at 1034 ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. 'It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.'") (quoting *United States v. Granderson,* 511 U.S. 39, 68 (1994) (concurring opinion)).

Here, 11 U.S.C. § 108(a) refers only to the trustee. There is no statutory authority allowing a Chapter 13 debtor to utilize this tolling provision. *See e.g.,* 11 U.S.C. § 1303; 11 U.S.C. § 1304(b). This court cannot rewrite 11 U.S.C. § 108(a) and the other applicable portions of Chapter 13 to reach such a result. *See id.* at 1032 ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.").

Chapter 13 Debtors – Strong Arm Powers

This issue is similar to the question whether a Chapter 13 debtor may utilize the trustee's strong-arm powers under 11 U.S.C. § 544. The trustee is allowed to utilize its strong-arm power to avoid certain prepetition transfers of property. Similar to the tolling provision found in 11 U.S.C. § 108(a), Chapter 11 and Chapter 12 debtors-in-possession are allowed to use these strong-arm powers via the blanket grants of the rights and powers of a trustee under 11 U.S.C. § 1107 and 11 U.S.C. § 1203. However, these strong-arm powers are not granted to a Chapter 13 debtor under 11 U.S.C. § 1303 or anywhere else in Chapter 13. The same policy argument exists here – why treat a Chapter 13 debtor differently than a Chapter 11 or Chapter 12 debtor-in-possession?

The Fifth Circuit discussed the split among the courts on whether a Chapter 13 debtor could utilize the trustee's strong arm powers under 11 U.S.C. § 544. *Reality Portfolio, Inc. v. Hamilton (In re Hamilton)*, 125 F.3d 292, 296-98 (5th Cir. 1997). The circuit noted that some courts have allowed a Chapter 13 debtor to use such power because of, "the 'reality' of Chapter 13 bankruptcies, the limited role of Chapter 13 trustees, and the perceived unfairness to Chapter 13 debtors of denying them standing under section 544, " notwithstanding the lack of explicit statutory authority. *Id.* at 296-97. The court noted that the recent trend was to refuse to extend the section 544 strong-arm powers to a Chapter 13 debtor thereby strictly adhering to the language of the Code. *Id.* However, in *Hamilton*, the court was able to rule on other grounds without deciding whether to extend the strong-arm power under 11 U.S.C. § 544 to a Chapter 13 debtor based on policy considerations. *Id.* at 297-98.

Later, the court came back in *Stangel v. United States* and unequivocally ruled that the literal language of the statute must prevail over perceived policy considerations when a Chapter 13 debtor seeks to invoke the trustee's avoidance powers. 219 F.3d 498, 501 (5th Cir. 2000). Though the court was evaluating the applicability of the avoidance powers in 11 U.S.C. § 545, the court applied the same reasoning previously used in connection with section 544 in *Hamilton*. *Id.* The court stated:

> The reasoning of both *Hamilton* and *Hartford Underwriters* strongly suggests that Stangel does not have standing under the plain reading of § 545. Both those opinions concerned Bankruptcy Code provisions that stated that trustees had certain powers, and both rejected interpretations that extended those powers to other parties in interest. That is precisely what Stangel asks us to do here, and, in light of those cases and the plain language of the statute, we refuse to do so.

Id. The same reasoning from this line of cases applies to this decision on the applicability of 11 U.S.C. § 108(a) to a Chapter 13 debtor. Both situations concern Bankruptcy Code provisions which state that trustees have certain powers. The Fifth Circuit has already disallowed the extension of the powers found in sections 544 and 545 to a Chapter 13 debtor.

Benefit to the Estate

The one reported decision on point held that a Chapter 13 debtor may indeed use the tolling provision found in 11 U.S.C. § 108. *Gaskins v. Metropolitan Home Imp. Ctr., Inc. (In re Gaskins)*, 98 B.R. 328, 330-31 (Bankr. E.D. Tenn. 1989). In *Gaskins*, the court noted the argument that a Chapter 13 debtor should be able to use section 108(a) as long as the lawsuit

benefits the bankruptcy estate. *Id.* at 331.[6] This argument has some merit under prior Fifth Circuit cases.

In *U.S. for Use of American Bank v. C.I.T. Const.*, the Fifth Circuit analyzed whether a creditor of a Chapter 11 debtor-in-possession could utilize the tolling provision under 11 U.S.C. § 108(a). 944 F.2d 253, 259-60 (5th Cir. 1991). In this case, the creditor was independently pursuing a claim under the Miller Act as successor in interest to the debtor-in-possession. *Id.* at 255. The court denied the application of section 108(a), holding "[n]either the language nor the purpose of section 108(a) support the proposition that a creditor independently pursuing a claim can avail itself of the elongated statute of limitation provided by section 108(a)." *Id.* at 259.

After discussing the absence of any statutory authority to allow the application of section 108(a) to such a creditor, the court noted that, additionally, any such recovery would not sufficiently benefit the bankruptcy estate. *Id.* at 259-60. Though the recovery might reduce the amount of total debt owing by the estate, any recovery would solely vest in that particular creditor. *Id.* The court analogized the situation to a post-confirmation Chapter 11 debtor prosecuting a suit in its own interest, as opposed to the bankruptcy estate's. *Id.* at 260 n.11.

In a prior opinion, the Fifth Circuit noted that, usually, a post-confirmation Chapter 11 debtor is not allowed to utilize the tolling provision under section 108(a). *Cunningham v. Healthco, Inc.*, 824 F.2d 1448, 1460 (5th Cir. 1987) ("While a debtor-in-possession is entitled

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[6]The weight placed by *Gaskins* on whether the lawsuit was for "the benefit of the estate" is unclear. *Compare id.* at 330 ("Section 108(a) should apply to a suit by the debtor in the place of the bankruptcy trustee. If the suit is in another court, the debtor would be wise to have an order from the bankruptcy court showing that the debtor is suing for the benefit of the bankruptcy estate."), *with id.* at 331 ("The court doubts that it should make any difference to whether or not this proceeding is for the benefit of the bankruptcy estate. . . .").

to § 108's tolling period, however, a debtor is not."). Confirmation of the plan normally vests property of the estate in the debtor, ending debtor-in-possession status, the court reasoned. *Id.* However, when the plan provides that the cause of action and the lawsuit do not vest in the debtor, a Chapter 11 debtor is still a "debtor-in-possession" as to the lawsuit and section 108(a) still applies. *Id.*

These holdings, when carefully examined, support the denial of applying section 108(a) to a Chapter 13 debtor. In *C.I.T. Construction*, the court first noted that the express language of the Bankruptcy Code does not support the application of section 108(a) to a creditor. *C.I.T. Constr. Inc.*, 944 F.2d at 259. While the court recognized the absence of a benefit to the estate, the court did not hold that merely conferring a benefit upon the estate was sufficient basis for any party to utilize section 108(a). In fact, the court stated that a creditor could only utilize section 108(a) if the creditor obtains prior court approval to sue in the trustee's name on behalf of the estate. *Id.* at 260 n.10 ("Only when the bankruptcy court allows a creditor to sue for the benefit of the estate can it claim the benefit of § 108(a)."). In its comparison of the creditor to a post-confirmation Chapter 11 debtor, the court references the distinction drawn in *Healthco*. *Id.* at 260. In *Healthco*, the court's holding turned on the litigant's status as debtor or debtor-in-possession because of one concern: the Bankruptcy Code allows a debtor-in-possession to utilize section 108(a) but denies such usage by the debtor. *Healthco, Inc.*, 824 F.2d at 1460 ("While a debtor-in-possession is entitled to § 108's tolling period, however, a debtor is not.").

Claim of Lee Lewis Construction, Inc.

Lee Lewis Construction, Inc. incurred additional charges of $39,586.86 by employing a third-party contractor to complete the masonry work. The Bowens do not dispute such charges. Lee Lewis Construction, Inc. requests a claim for this amount. This claim is raised as an affirmative defense. The Bowens did not raise a limitations' defense to this claim and do not dispute the amount of the claim. *Leavell v. Kieffer*, 189 F.3d 492, 494-95 (7th Cir.1999) (discussing that statute of limitations is not jurisdictional but instead an affirmative defense); *Davis v. Huskipower Outdoor Equipment Corp.*, 936 F.2d 193, 198 (5th Cir.1991) ("Rule 8(c) characterizes a statute-of-limitations defense as an affirmative defense that is waived unless pleaded by the defendant."). No evidence was presented that Lee Lewis Construction, Inc. filed a proof of claim or that it was even provided with notice of the bankruptcy in time to file a claim. The court notes that this adversary was filed over fourteen months after the bankruptcy filing.

The court therefore resolves this issue by determining whether the Bowens breached the contract thereby justifying Lee Lewis Construction, Inc.'s claim. The Bowens abandoned the job when Lee Lewis Construction, Inc. refused to pay the entirety of the third pay application. The Bowens also contend, however, that the job site conditions were such that they could not resume work. There is merit to their claims. The site was dangerous as admitted by Joe Martinez, Lee Lewis Construction, Inc.'s job superintendent. The interior slab was still being poured, resulting in several trucks each day entering the building at the opening in the front facade where masonry blocks were being installed by Rapid Masonry Construction. This created a significant risk to Rapid Masonry Construction's workers. One accident had already occurred when a Lee Lewis

Construction, Inc. forklift backed into Rapid Masonry Construction's scaffolding. There were ditches around the perimeter of the building, which created problems. Lee Lewis Construction, Inc. had not, in all places, provided the damp-proofing, which caused delays. In short, the court is not convinced that Lee Lewis Construction, Inc. was fully justified in terminating the contract. Rapid Masonry Construction's decision to pull off the job was justified by the actions and inaction of Lee Lewis Construction, Inc. *See Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994) (discussing that when a party materially breaches a contract, the non-breaching party is excused from any further obligation to perform); *Hallmark v. Hand*, 833 S.W.2d 603, 610 (Tex. App.–Corpus Christi 1992, writ denied) ("Every contract contains an implied promise that a party will not do anything to delay or prevent the other party from performing his part of the contract.") (citing *Texas Nat'l Bank v. Sandia Mortgage Corp.*, 872 F.2d 692, 698 (5th Cir. 1989)). Lee Lewis Construction, Inc. was demanding that Rapid Masonry Construction resume work at precisely the time of the unsafe conditions. The claim of Lee Lewis Construction, Inc. is denied.

Conclusion

The court finds that the Bowens' claims are barred by limitations and that section 108 of the Code cannot be invoked by the Bowens to extend or toll the applicable limitations period. The court further finds that Lee Lewis Construction, Inc. was not justified in terminating the contract with the Bowens and thus its claim is denied. All other relief is denied.

SIGNED March 29, 2004.

ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE